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No. 84-1065

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES S. KRAVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, which took a number of steps to ensure that the jury was not exposed to prejudicial publicity during trial, committed reversible error in not conducting individual voir dire of each of the jurors throughout the trial and not holding a post-trial hearing on the issue of juror exposure.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 738 F.2d 102.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1984. A petition for rehearing was denied on October 29, 1984 (Pet. App. A13). The petition for a writ of certiorari was filed on December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of engaging or participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count One), and of using or causing the use of a telephone in order to carry on bribery,

in violation of 18 U.S.C. 1952 (Count Five) (Pet. App. A2). Petitioner was sentenced to a four-year term of imprisonment on Count One to be followed by five years' probation on Count Five. He was also fined a total of $35,000 and ordered to forfeit his stock in American Health Plans, Inc. C.A. App. 1301a.[1]

1. The evidence at trial established that petitioner, a dentist, was the principal officer of American Health Plans, Inc. (AHP), a corporation that provided dental, optical, and prescription service by contract with Lodge 5 of the Philadelphia Fraternal Order of Police (FOP) (C.A. App. 475a-476a, 478a). The contract, worth $4.5 million per year in fees to AHP, was due to expire in June 1982 (*id.* at 478a, 513a).

In April 1982, Robert Hurst was elected to be president of the FOP (C.A. App. 476a). As part of the process of renewing its health care contract, the FOP formed a 20-member committee to review various health benefit programs (*id.* at 478a). After overtures had been made to Hurst on behalf of petitioner, Hurst contacted the United States Attorney's office because he thought he "might be in for a bribe" with respect to renewal of the AHP contract (*id.* at 479a-480a). Acting in cooperation with the government, Hurst met with petitioner on May 10, 1982 (*id.* at 481a).

Hurst met again with petitioner on May 13; during this meeting Hurst wore a recording device (C.A. App. 487a, 488a). Petitioner assured Hurst that he was reliable, pointing to his testimony during a recent federal criminal trial (*id.* at 955a-956a). In an effort to retain the FOP contract for AHP, petitioner then discussed alternative types of inducements for Hurst, eventually offering Hurst a home in the Pocono Mountains (*id.* at 960a-961a, 963a). Petitioner suggested that Hurst and his wife visit the Poconos to look for a

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[1]"C.A. App." refers to petitioner's appendix in the court of appeals.

home and offered to provide spending money to Hurst for the trip (*id.* at 965a-966a). In addition, petitioner offered Hurst the use of his seaside home in Margate, New Jersey (*id.* at 970a).

By prior arrangement, petitioner and Hurst also met the next day at a Philadelphia department store (C.A. App. 971a-972a, 513a). Following lunch, petitioner handed Hurst a "wad of bills" that petitioner said contained $1,000; included with the money were several tickets to Philadelphia Phillies games and AHP brochures (*id.* at 514a-516a). At no time had Hurst ever requested money from petitioner (*id.* at 515a).

On May 19, 1982, petitioner and Hurst met again at a cafe. Petitioner repeated his offer to let Hurst use his Margate condominium (C.A. App. 516a, 974a). Petitioner also gave Hurst another unsolicited $1,000 in a matchbox and indicated he would pay him an additional $5,000 at a meeting in Margate (*id.* at 517a, 520a, 974a, 975a). On June 4, 1982, petitioner met Hurst in a Margate motel, a meeting that was videotaped by the FBI (*id.* at 520a-521a). During the meeting, petitioner gave Hurst an unsolicited payment of $5,000 wrapped in a plastic bag (*id.* at 978a).

On June 11, 1982, Hurst introduced petitioner to Michael Lutz, recording secretary of the FOP, who was in charge of the FOP review of various health plans (C.A. App. 622a, 986a). During a meeting in a hotel room, Lutz voiced concern about AHP to petitioner, and shortly thereafter petitioner gave Lutz an unsolicited $1,000 payment (*id.* at 623a, 625a-626a, 627a).

2. On appeal, petitioner raised a number of challenges to his convictions, including the argument that he was denied a fair trial by the district court's failure to take adequate measures to prevent jury exposure to prejudicial publicity during trial (Pet. App. A3 n.l). In affirming, the court of

appeals found it unnecessary to discuss the claim of jury exposure to publicity, concluding that it was "without merit" (*id.* at A3).

ARGUMENT

Petitioner contends (Pet. 12-22) that the district court committed reversible error and deprived him of a fair trial by declining either to conduct daily individual voir dire of the jurors regarding their possible exposure to news accounts that appeared during the trial or to make a post-trial inquiry of the individual jurors regarding that publicity. A full exposition of the record shows that petitioner's contention is unfounded and does not warrant this Court's review.

1. Trial of this case began on Monday, April 11, 1983. On the morning of April 12, the Philadelphia Inquirer, § B, at 3, carried a report of the trial that revealed that petitioner had previously entered a guilty plea in the case but had withdrawn it and chosen to go to trial (see C.A. App. 494a, 1294a).[2] That morning, petitioner requested and was granted individual voir dire of each of the jurors in private (C.A. App. 495a-496a). All of the jurors testified that they had neither seen any news accounts of the trial nor discussed the trial with anyone (*id.* at 496a-509a). Juror 11 stated that he had a copy of the newspaper but that he had not yet read it. The district court instructed him, as it instructed all the jurors individually, that he should avoid any news account of the trial and should not discuss the trial with anyone. *Ibid.*; see especially *id.* at 506a-507a.

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[2]In accordance with a plea agreement with the government, petitioner entered a plea of guilty in this case. When the government later determined that petitioner had breached his agreement, the district court permitted him to withdraw the plea. See generally Gov't C.A. App. 68a-78a, 104a-106a; C.A. App. 22a-33a.

At the conclusion of the individual voir dire, the court again cautioned the jury as a group that it must take care not to learn information about the case outside the courtroom that might contaminate its judgment. In addition, although not banning the jurors from reading the newspaper altogether, the court specifically instructed the jury to avoid all types of news accounts of the trial. C.A. App. 510a-511a. At the end of that first day of trial, the court once more admonished the jury against reading or listening to news accounts about the case (*id.* at 627a-628a).

On the evening of April 12, during its 11 p.m. news broadcast, a local television station reported an account of the trial, including the fact that petitioner had earlier pleaded guilty to charges in this case but had later withdrawn the plea (C.A. App. 634a). The next day, defense counsel requested that the district court voir dire the jurors individually to determine whether they had been exposed to the broadcast.[3] The court stated that it would first ask the jury as a group whether anyone had seen or heard any news accounts, and, if so, individual inquiry would then be made. However, none of the jurors had seen or heard any news report. C.A. App. 634a-635a.

Evidence in the trial was concluded on April 13. Prior to the luncheon recess, the district court reminded the jurors to avoid any news reports about the case (C.A. App. 646a). Following counsel's closing arguments, the court forbade the jury from reading newspapers or listening to news broadcasts in any form. It explained that it was taking this

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[3]As petitioner notes (Pet. 5), the April 13 Philadelphia Inquirer again carried an account of the trial (C.A. App. 129ba), but petitioner's motion made no reference to this newspaper article (*id.* at 634a).

measure as a means of maintaining the integrity of the trial process without sequestering the jury and that it would again inquire about news exposure in the morning. C.A. App. 744a-745a.

On April 14, 1983, the Philadelphia Daily News carried a news account and an editorial regarding the trial (C.A. App. 1298a-1299a). Petitioner's counsel did not request individual voir dire of the jurors (C.A. App. 1214a), but instead moved for a mistrial (*id.* at 750a). The district court denied the motion because it was based simply on the fact that articles had appeared in the newspapers and not on the fact that the jurors had seen any of the stories (*id.* at 750a-751a). All of the jurors again disclaimed having seen or read any news accounts of the trial (*id.* at 751a-752a).

At the conclusion of the first day of deliberations, petitioner moved to have the jury sequestered. The district court denied this motion because sequestration had not been raised at the time the jury was selected and the jurors were not prepared for it (C.A. App. 843a). The court did, however, reiterate in detail the prior instructions that the jurors must not read or listen to any news accounts and must not permit discussions of the trial in their presence. The court also stated that it would again inquire in the morning whether the jury had been inadvertently exposed to any news stories. *Id.* at 844a-845a.

On the morning of Friday, April 15, the jurors indicated that they had neither seen nor heard anything regarding the trial (C.A. App. 847a). Petitioner's counsel did not move for individual voir dire of the jurors (*id.* at 1214a). Toward the end of the day, the jury requested that it be excused from further deliberations until Monday because of prior commitments of some of the jurors. Petitioner did not object to

that request (*id.* at 858a-859a),[4] and the district court granted it. In doing so, the court emphasized to the jurors that they must be especially cautious to avoid any exposure to news broadcasts over the weekend (*id.* at 859a).

On Monday morning, April 18, the district court once more inquired into the question of prejudicial publicity, and the jurors again disclaimed any exposure to news reports or discussions of the trial (C.A. App. 862a). Contrary to his claim (Pet. 9), petitioner made no request for individual voir dire of the jury (C.A. App. 1214a). That afternoon, the jury returned its verdicts. Before the jurors were excused, petitioner made no further motion that the jurors be interrogated about exposure to news accounts (*ibid.*).[5]

Immediately prior to sentencing, petitioner requested that his counsel or the district court conduct individual voir dire of each of the jurors at a post-trial hearing to determine whether any of them had learned that petitioner had pleaded guilty but withdrawn his plea prior to trial (C.A. App. 1223a). The court denied the motion as simply a variant of the previously rejected argument that daily individual voir dire of the jurors was required. The court found no reason to believe, based on the jurors' daily response to its inquiries, that the jurors had lied when asked whether they had been exposed to news accounts or discussions of the trial. *Id.* at 1223a-1224a.

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[4]Despite petitioner's claim (Pet. 8) that he moved for sequestration of the jury for the weekend, the record reflects no such motion. While there is, of course, no transcript of any off-the-record conference that may have been held with the court or the United States Marshal regarding sequestration, the record clearly reflects that petitioner's counsel made no objection to the district judge's decision in open court to excuse the jury for the weekend (C.A. App. 859a).

[5]Shortly after trial, the district court denied motions of both parties to interview the jury (C.A. App. 1224a).

2. It is well settled that the district court "has substantial discretion in deciding whether allegations [of prejudice affecting the jury's verdict] are of sufficient substance to require investigation and, if so, how the investigation should be conducted." 3 C. Wright, *Federal Practice and Procedure: Criminal* § 554, at 261-262 (1982). Petitioner has failed to show that the district court erred in the circumstances of this case in declining either to conduct individual voir dire of the jurors on a daily basis or to hold a post-trial hearing to make such an individualized inquiry of each juror.

a. Contrary to petitioner's argument, the courts of appeals have recognized that a district court is not required to conduct individual voir dire of each juror on the issue of exposure to prejudicial publicity during trial. See, *e.g.*, *United States* v. *Perrotta*, 553 F.2d 247, 249-250 (1st Cir. 1977); *United States* v. *Tsanas*, 572 F.2d 340, 342, 347 (2d Cir.), cert. denied, 435 U.S. 995 (1978); *United States* v. *Jackson*, 649 F.2d 967, 974 (3d Cir.), cert. denied, 454 U.S. 871 and 1034 (1981); *United States* v. *Crowell*, 586 F.2d 1020, 1024 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *United States* v. *Jones*, 542 F.2d 186, 194 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *United States* v. *Hankish*, 502 F.2d 71, 77 (4th Cir. 1974); *United States* v. *Phillips*, 664 F.2d 971, 997-998 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States* v. *Ricardo*, 619 F.2d 1124, 1131-1132 (5th Cir.), cert. denied, 449 U.S. 1063 (1980); *United States* v. *Capo*, 595 F.2d 1086, 1092-1093 (5th Cir. 1979), cert. denied, 444 U.S. 1012 (1980); *United States* v. *Wilson*, 715 F.2d 1164, 1168-1169 (7th Cir. 1983), cert. denied, No. 83-5598 (Nov. 14, 1983) and No. 83-5702 (Jan. 9, 1984); *Margoles* v. *United States*, 407 F.2d 727, 735 (7th Cir.), cert. denied, 396 U.S. 833 (1969); *United States* v. *Eaglin*, 571 F.2d 1069, 1985 n.21 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

The decisions cited by petitioner (Pet. 16-17 n.11) do not establish a different rule. In three of those cases, the court of appeals simply described the fact that the district court had conducted individual voir dire on the issue of exposure to prejudicial publicity; there was no indication, however, that voir dire of the jury as a group would have been reversible error. See *United States* v. *Gigante*, 729 F.2d 78, 81 (2d Cir. 1984), cert. denied, No. 83-1699 (May 21, 1984); *United States* v. *Krevsky*, 741 F.2d 1090, 1093 (8th Cir. 1984); *Parker* v. *United States* 404 F.2d 1193, 1197 (9th Cir. 1968), cert. denied, 394 U.S. 1004 (1969).[6] In the remaining two cases upon which petitioner relies, the district court had failed to conduct any voir dire at all. See *United States* v. *Herring*, 568 F.2d 1099, 1104-1105 (5th Cir. 1978);[7] *Mares* v. *United States*, 383 F.2d 805, 808 (10th Cir. 1967).[8]

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[6]Furthermore, to read *Gigante* and *Parker*, as petitioner does, to require individual voir dire would bring those decisions into conflict with the decisions of the respective circuits in *United States* v. *Tsanas, supra*, and *United States* v. *Eaglin, supra*.

[7]In *United States* v. *Capo*, 595 F.2d at 1093, the Fifth Circuit made clear that *Herring* does not require a district court to undertake individual voir dire in all cases to determine whether jurors were exposed to media publicity during trial.

[8]In *Mares*, the court of appeals, in ruling on the issue of voir dire to determine whether there had been juror exposure to publicity during trial, relied on the decision in *Coppedge* v. *United States*, 272 F.2d 504, 508 (D.C. Cir. 1959), cert. denied, 368 U.S. 855 (1961). See 383 F.2d at 809 n.7. But *Coppedge* involved the question whether exposure to publicity was prejudicial, not whether, as in *Mares* and in this case, such exposure had occurred at all. As the courts of appeals have recognized, individual voir dire is appropriate on the issue of prejudicial effect because of possible juror reticence to admit prejudice in front of other jurors and the need to prevent any prejudice from being spread to the entire jury. See *United States* v. *Jackson*, 649 F.2d at 976; *United States* v. *Tsanas*, 572 F.2d at 347; *United States* v. *Perrotta*, 553 F.2d at 250. As the courts have also recognized, such concerns do not equally apply to the antecedent question whether a juror was exposed to media publicity in the first instance, and therefore individual voir dire is not required.

In this case, the approach followed by the district court was not error. On the first occasion that adverse publicity occurred during trial, the district court granted individual voir dire of each of the jurors, which revealed that none of them had been exposed to the article in question. Each of the jurors was then instructed to avoid any news account or discussion about the trial, and this admonition was subsequently repeated several times. In addition, the court thereafter conducted voir dire of the jury as a group on a number of instances and was satisfied that no juror exposure had occurred. Finally, the court ultimately admonished the jury to avoid all exposure to newspapers or broadcasts regardless of whether they concerned the petitioner's case. As the above-cited decisions demonstrate (see page 8, *supra*), these measures were adequate to preserve petitioner's right to a fair trial and did not constitute reversible error.

b. There is likewise no merit to petitioner's contention that the district court erred in declining to hold a post-trial hearing in order to conduct individual voir dire of each juror. As discussed above, the district court took adequate steps during trial to ensure that the jury was not exposed to prejudicial publicity. Because the issue of jury exposure had been raised and resolved in the course of the trial, it was not error for the district court to decline to commence a post-trial hearing to address the matter.[9]

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[9]This case is therefore unlike those upon which petitioner relies (Pet. 12, 14-15, 20), such as *Smith* v. *Phillips*, 455 U.S. 209 (1982), in which the issue of jury prejudice arose only after the trial had been concluded. See also *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983), slip op. 4-6. In that situation, a post-trial hearing "in which the defendant has the opportunity to prove actual bias" is necessary to determine whether there has been a violation of " 'the defendant's right * * * [to have] the particular jury that heard the case * * * adjudicate fairly' " (455 U.S. at 215, 217; citation omitted). Here, however, the safeguards taken in the course of the trial protected against unfair prejudice and obviated the need for a post-trial hearing. In this case the district court during trial was "ever watchful to prevent prejudicial occurrences" (*id.* at 217).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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